IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

WALTER BUSSEY; DOLLIE WILLIAMS; MAUDIE GREEN; DAVID M. PALMER, II; ROBIN PAIGE; PATRICIA WILBORN; and BARBARA GRAHAM, Plaintiffs, v. MACON COUNTY GREYHOUND PARK, INC. d/b/a "VICTORYLAND" and "QUINCY'S 777"; MILTON E. MCGREGOR; MULTIMEDIA GAMES, INC.; IGT; CADILLAC JACK, INC.; COLOSSUS, INC.; MIAMI TRIBE OF OKLAHOMA BUSINESS DEVELOPMENT AUTHORITY d/b/a ROCKET GAMING SYSTEMS; NOVA GAMING, LLC; and BALLY GAMING, INC., Defendants.	)	CASE NO. 3:10-cv-00191-WKW-WC

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MIAMI TRIBE OF OKLAHOMA BUSINESS DEVELOPMENT AUTHORITY'S MOTION TO DISMISS

COME NOW the Plaintiffs and respond to the Defendant's Motion to Dismiss Plaintiffs' claims against Miami Tribe of Oklahoma Business Development Authority d/b/a Rocket Gaming Systems based on their purported sovereign immunity as follows:

INTRODUCTION

On June 17, 2010, Plaintiffs filed their amended class action complaint ("Complaint"), charging the Defendant Miami Tribe of Oklahoma Business Development Authority d/b/a Rocket Gaming Systems ("Defendant") with owning, providing and/or operating illegal gambling devices in the State of Alabama in violation of Ala. Code § 8-1-150. Pl.'s Am. Compl.

at 5-11. Doing business as Rocket Gaming Systems, the Defendant is one of the nation's pioneers and leading suppliers of electronic bingo gambling devices. *See* Letter from Ron Harris, Chief Executive Officer, Rocket Gaming Systems, to Philip Hogen, Chairman, National Indian Gaming Commission 1-2 (November 14, 2006) <http://www.nigc.gov/Portals/0/NIGC%20Uploads/classiigmeclasfnstds/comtsrecdfrtribes/miamitribeok.pdf>. According to Defendant, it currently has a presence in approximately eighty tribal gaming facilities in twelve states across the country. *See id.* at 2. On July 14, 2010, Defendant filed a motion to dismiss portions of Plaintiffs' Complaint. In its motion, Defendant argues that it should be dismissed from this action due to the doctrine of sovereign immunity. However, the motion to dismiss should be denied because Defendant does not have sovereign immunity from suit by the Plaintiffs, *infra*.

LEGAL STANDARD FOR A MOTION TO DISMISS

The legal standard on a motion to dismiss sets a high bar. The court "accepts the plaintiff's allegations as true, and construes the complaint in the plaintiff's favor. In analyzing the sufficiency of the pleading … where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to entitlement to relief." *See Pugh v. Kobelco Constr. Mach. America, LLC*, 2010 WL 2574174, slip op. at *1 (M.D. Ala. 2010) (citing several Supreme Court decisions) (internal citations omitted). "To survive a motion to dismiss, a complaint need not contain 'detailed factual allegations,' but instead the complaint must contain 'only enough facts to state a claim to relief that is plausible on its face.'" *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 545, 555 (2007)).

Based on this standard and for the reasons discussed in detail below, Defendant's motion to dismiss should be denied.

ARGUMENTS AND AUTHORITIES

I. THE MOTION TO DISMISS SHOULD BE DENIED BECAUSE DEFENDANT DOES NOT HAVE SOVEREIGN IMMUNITY FROM SUIT BY THE PLAINTIFFS.

The motion to dismiss should be denied because the Defendant, as an agent of the Miami Tribe of Oklahoma, cannot claim sovereign immunity. Furthermore, a motion to dismiss would be premature at this stage because the Defendant likely waived any claim to sovereign immunity by contract or other agreement. In relying on sovereign immunity, the Defendant has raised prematurely a factually-based defense and consequently seeks to prevent the Plaintiffs from conducting discovery on such fact-based claims. At a minimum, the motion to dismiss should be denied in order to allow the Plaintiffs to conduct discovery on the issue of whether the Defendant waived sovereign immunity by contract or other agreement.

While the doctrine of tribal sovereign immunity has been reiterated many times in case law, *see generally Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-60 (1978) (discussing the convoluted and controversial history of Indian tribe sovereign immunity), the Supreme Court has held that Indian tribes are subject to suit in federal court "where Congress has authorized the suit or the tribe has waived its immunity." *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *see also Santa Clara Pueblo* at 72. In *Kiowa*, the Supreme Court recognized that tribal sovereign immunity is a federally-mandated matter subject to regulation and diminution. *See Kiowa*, 523 U.S. at 756. Thus, while a claim of sovereign immunity may raise a jurisdictional defense, *see Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004), sovereign immunity can be negated where the *Ex parte Young* doctrine allows suits against agents and officers of Indian tribes or where the Indian tribe itself has waived sovereign immunity. *See Kiowa*, 523 U.S. at 754; *see also Ex parte Young*, 209 U.S. 123 (1908).

a. Defendant does not have sovereign immunity because lawsuits against tribal agents and/or officers are warranted under the *Ex parte Young* doctrine.

Defendant has no sovereign immunity with regard to its actions here as Rocket Gaming Systems. Under the *Ex parte Young* doctrine, lawsuits against entities acting as agents or officers of an Indian tribe are permitted. *See Ex parte Young*, 209 U.S. at 167. The Supreme Court's decision in *Ex parte Young* recognized an exception to traditional notions of sovereign immunity, holding that "certain suits seeking declaratory and injunctive relief against state officers in their individual capacities" overrides the applicability of sovereign immunity. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). The Supreme Court has expanded the doctrine to allow lawsuits as well as court-mandated relief against tribal agents and/or officers. *See, e.g.*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (recognizing that suits against tribal agents or officers are permissible under *Ex parte Young*); *see also Puyallup Tribe, Inc. v. Wash. Dep't of Game*, 433 U.S. 165, 171-72 (1977) (recognizing that officers of an Indian tribe are not protected by the tribe's immunity from suit); *Santa Clara Pueblo*, 436 U.S. at 59 (recognizing the *Ex parte Young* exception to tribal sovereign immunity). In *Oklahoma Tax Commission*, for example, in upholding the sovereign immunity of an Indian tribe with regard to an Oklahoma cigarette sales tax, the Court held that the state could have brought an action against the individual agents or officers of the tribe in order to obtain damages. *See Oklahoma Tax Comm'n*, 498 U.S. at 514. In addition, in *Puyallup Tribe*, the Court held that, even if the tribe itself could not be sued in contravention of sovereign immunity, a suit against individual members or agents of a tribe for violating state law is permissible. *See Puyallup Tribe*, 433 U.S. at 172. Furthermore, in *Santa Clara Pueblo*, upon which the Defendant heavily relies in its argument for sovereign immunity, the Supreme Court reiterated the *Ex parte Young* exception to tribal sovereign immunity in

holding that the defendant, as an officer or agent of the tribe, was not protected by the tribe's immunity from suit. *See Santa Clara Pueblo*, 436 U.S. at 59 (citing both *Ex parte Young* and *Puyallup Tribe*). The only limitation applicable here, in order for an individual plaintiff to bring a claim against a tribal agent or officer in contravention of sovereign immunity, is that the statute at issue must create an implied, private cause of action. *See Santa Clara Pueblo*, 436 U.S. at 59.

The *Ex parte Young* doctrine controls here. Plaintiffs' complaint sets forth claims against the Defendant "[doing business as] Rocket Gaming Systems." Pl.'s Am. Compl. at 4. Rocket Gaming Systems is doing business on behalf of the Miami Tribe of Oklahoma – as its agent. Defendant's motion admits as much. Def.'s Mot. Dismiss at 1 (admitting that Defendant "act[s] as a government branch of the Miami Tribe and pursue[s] financial opportunities to benefit the Miami Tribe."). In addition, the statute at issue in this case, Ala. Code § 8-1-150, specifically includes a cause of action for individual plaintiffs in the following manner: "Any person who has paid money or delivered any thing of value upon any game or wager may recover such money, thing, or its value by an action commenced within six months from the time of such payment or delivery." *See* § 8-1-150(a). Because this statute provides a private cause of action, the Plaintiffs have stated valid claims against this Defendant pursuant to the statute. So, both requirements for invoking the *Ex parte Young* exception are present here: (1) the Defendant is acting as an agent for the Miami Tribe of Oklahoma, and (2) the statute in question creates a private cause of action. Under these circumstances, the Defendant does not have sovereign immunity against Plaintiffs' claims.

b. Defendant does not have sovereign immunity because it likely waived any claim to sovereign immunity by contract.

The Defendant does not have sovereign immunity because it likely waived any claim to such immunity in the course of its business dealings in Alabama. Under *Kiowa*, an Indian tribe

is subject to suit where the tribe has waived its sovereign immunity. *See Kiowa*, 523 U.S. at 754. Because many businesses involved with Indian tribes understand the implications of tribal sovereign immunity, such businesses usually enter into contracts that explicitly waive the tribe's sovereign immunity under the terms of the contract. *See, e.g.*, *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1038, 1048 (11th Cir. 1995) (recognizing that Indian tribes often waive sovereign immunity explicitly in contracts in order to engage in gaming activities). Such a waiver pursuant to a tribe's gambling activities would constitute a waiver of sovereign immunity, depending on the terms of the contract. *See id.* at 1048. It is perfectly reasonable to assume, given the unmistakable business sophistication of the other Defendants involved, including Milton McGregor, that in order to do business with the other Defendants and in the State of Alabama, this Defendant likely waived sovereign immunity explicitly by contract with either the State of Alabama or with persons or entities in Alabama with which it contracted in order to provide gambling systems (i.e., the other Defendants in this case). However, at this stage of the litigation, without the benefit of discovery, Defendants' contracts (and waivers) are not in the Plaintiffs' possession. It is well accepted that, on a motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Conley v. Gibson*, 355 U.S. 41, 46 (1957). In this case, Plaintiffs most likely can prove, through the process of discovery, that the Defendant waived by contract any claim it may have had to sovereign immunity. Thus, it would be inappropriate to dismiss Defendant from the case at this juncture, since it might have waived sovereign immunity through its course of business conduct (e.g., in contracts or other agreements) in Alabama. *See, e.g.*, *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993) (holding that a motion to

dismiss should be granted only "when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action"); *Whitson v. Staff Acquisition, Inc.*, 41 F. Supp. 2d 1294, 1300 (M.D. Ala. 1999) (holding that a motion to dismiss for lack of jurisdiction should be denied to permit proper discovery of germane facts).

WHEREFORE, the above premises considered, Plaintiffs respectfully request that Defendant's Motion to Dismiss be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CF/ECF electronic filing system on this the ___ day of August 2010. In the event that the CF/ECF electronic filing system does not send notification to the following, undersigned counsel will serve the following via U.S. mail:

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